Office - Supreme Court, U.S.
FILED
AUG 31 1982
ALEXANDER L. STEVAS,
CLERK

82-362

In The

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-

VENTURE TECHNOLOGY, INC.,

Petitioner,

vs.

NATIONAL FUEL GAS DISTRIBUTION CORPORATION AND FLINT OIL & GAS COMPANY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES MATTHEW HARTMAN, ESQ.
Counsel of Record for Petitioner
Two State Street
Rochester, New York 14614
Telephone: (716) 232-4440

Of Counsel:
Richard L. Smith
Harris, Beach, Wilcox
Rubin and Levey

Daily Record Corporation
Rochester, New York
(J8635)
Spaulding Law Printing
Syracuse, New York

QUESTIONS PRESENTED

1. What evidence may the Court of Appeals properly consider in reviewing the denial of a motion for judgment n.o.v. and the underlying verdict, and to what extent may it draw inferences from such evidence contrary to those drawn by the jury?

2. What is the proper measure of the quantum and the nature of evidence required to prove concerted action in violation of Section 1 of the Sherman Act, 15 U.S.C. §1?

STATEMENT PURSUANT TO SUPREME COURT RULES 21 AND 28.1

Petitioner, Venture Technology, Inc., was the appellee in the court below. National Fuel Gas Distribution Corporation and Flint Oil & Gas Company, Inc. were the appellants in the court below. National Fuel Gas Company was a defendant in the District Court, but was not a party to the appeal to the Court of Appeals for the Second Circuit.

TABLE OF CONTENTS

	Page
Questions Presented	*i*
Statement Pursuant to Supreme Court Rules 21 and 28.1	*i*
Table of Contents	*ii*
Table of Authorities	*iii*
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
REASONS FOR GRANTING THE WRIT OF CERTIORARI	
I. Certiorari should be granted to review the standard imposed by the Second Circuit in a recent line of cases, in conflict with the First and Third Circuits, which permits the Appellate Court to make a *de novo* determination of factual issues	10
A. *The Second Circuit's Review Of Jury Verdicts Conflicts With The Principles Established By This Court Affirming The Role Of Juries And District Courts In Determining Questions Of Fact*	14
B. *The Second Circuit's Review Of All Evidence To Determine Whether Substantial Evidence Supports A Jury Verdict Conflicts With Decisions Of The First And Third Circuits*	17
II. This Court should review the standard imposed by the Second Circuit which limits the nature of the evidence deemed sufficient to demonstrate concerted action under Section 1 of the Sherman Act	20
Conclusion	22

TABLE OF AUTHORITIES

Cases: Page

American Tobacco Co. v. United States, 147 F.2d 93 (6th Cir. 1944) 20

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S 355 (1962)..... 19

Battle v. Lubrizol Corp., 673 F.2d 984 (8th Cir. 1982). . 22

Beltz Travel Service, Inc. v. International Air Transport Association, 620 F.2d 1360 (9th Cir. 1980)..... 16

Bigelow v. Agway, Inc., 506 F.2d 551 (2d Cir. 1974) ... 14, 18

Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969)... 18

Boutros v. Riggs National Bank, D.C., 655 F.2d 1257 (D.C. Cir. 1981)..... 18

Brady v. Southern Railway Co., 320 U.S. 476 (1943)... 17

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 16, 20

County Asphalt, Inc. v. Lewis Welding & Engineering Corp., 444 F.2d 372 (2d Cir. 1971)..... 18

Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653 (1st Cir. 1961) 17

Epoch Producing Corp. v. Killiam Shows, Inc., 522 F.2d 737 (2d Cir. 1975)..... 19

Fireman's Fund Insurance Co. v. Videfreeze Corp., 540 F.2d 1171 (3d Cir. 1976)..... 17

Fuchs Sugar & Syrups, Inc. v. Amstar Corp., 602 F.2d 1025 (2d Cir. 1979), *cert. denied*, 444 U.S. 917 (1979). 20

Gunning v. Cooley, 281 U.S. 90 (1930) 17

H.L. Moore Drug Exchange v. Eli Lilly & Co., 662 F.2d 935 (2d Cir. 1981), petition for *cert. filed*, ____ U.S. ____, 50 U.S.L.W. 3984 (May 28, 1982) (No. 81-2215) 9, 11, 21

Inventive Music Ltd. v. Cohen, 617 F.2d 29 (3d Cir. 1980) 17

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., ____ U.S. ____, 72 L. Ed.2d 606 (1982) 2, 14

Lavender v. Kurn, 327 U.S. 645 (1946) 17

Layne v. Vinzant, 657 F.2d 468 (1st Cir. 1981) 17

Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036 (2d Cir. 1976) 11, 19, 20

Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir. 1978), *cert. denied*, 439 U.S. 946 (1978) 11

Oreck Corp. v. Whirlpool Corp., 639 F.2d 75 (2d Cir. 1980), *cert. denied*, 102 S.Ct. 639 (1981) 11, 21

Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981) 18

Pullman-Standard, Division of Pullman, Inc. v. Swint, ____ U.S. ____, 72 L. Ed.2d 66 (1982) 2, 14, 15

Schwimmer v. Sony Corp. of America, 677 F.2d 946 (2d Cir. 1982), petition for *cert. filed*, 51 U.S.L.W. ____ (U.S. August 16, 1982) (No. 82-277) 11, 12, 21

Simblest v Maynard, 427 F.2d 1 (2d Cir. 1970) 18

Spray-Rite Service Corp. v. Monsanto Co., ____ F.2d ____, 1982-2 Trade Cases ¶64,808 (7th Cir. 1982) 21

Tennant v. Peoria & Pekin Union Railway Co., 321 U.S. 29 (1944) 16, 17

Unijax, Inc. v. Champion International, Inc., ____ F.2d ____, 1982-2 Trade Cases ¶64,814 (2d Cir. 1982 12

United States v. National Association of Real Estate Boards, 339 U.S. 485, (1950) 15

United States v. Patten, 226 U.S. 525 (1913) 20

Yazzie v. Sullivent, 561 F.2d 183 (10th Cir. 1977) 17

Statutes:

U.S. Const. Amend. VII 2, 19

15 U.S.C. §1 ..... *i*, 2, 7

15 U.S.C. §15 7

28 U.S.C. §1254(1) 2

28 U.S.C. §1331 7

28 U.S.C. §1337 7

Fed. R. Civ. P. 50 2

N.Y. Gen. Bus. Law §340 (McKinney 1968) 7

Treatises:

Bagalay, *Directed Verdicts and the Right to Trial by Jury in Federal Courts*, 42 Tex. L. Rev. 1053 (1964) .. 18

Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 Minn. L. Rev. 903 (1971) 18

James, *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 Va. L. Rev. 218 (1961) 18

9 C. Wright and A. Miller *Federal Practice and Procedure* (West 1971) 10, 18

In The

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-

VENTURE TECHNOLOGY, INC.,

Petitioner,

vs.

NATIONAL FUEL GAS DISTRIBUTION CORPORATION AND FLINT OIL & GAS COMPANY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The following opinions of the Court of Appeals and the District Court are set forth in the Appendices in chronological order:

The opinion of the District Court denying the joint motion of Distribution and Flint for judgment n.o.v. is reported at 1980-81 Trade Cases ¶63,780 (W.D.N.Y. 1981), and is set forth in Appendix A.

The opinion of the Court of Appeals for the Second Circuit, ____ F.2d ____, (Nos. 81-7069, 81-7107, July 26, 1982) is set forth in Appendix B.

The judgment of the Court of Appeals for the Second Circuit, entered on July 26, 1982, is set forth in Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on July 26, 1982. This Court has jurisdiction over this petition pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal constitutional and statutory provisions involved are Rule 50 of the Federal Rules of Civil Procedure, Section 1 of the Sherman Act, 15 U.S.C. §1, and the Seventh Amendment to the United States Constitution. They are set forth in Appendix D.

STATEMENT OF THE CASE

This case presents the Court with an opportunity to resolve the conflict among the circuits concerning the proper standard of review of jury verdicts and motions for judgment n.o.v. The conflict centers on the scope of the evidence which the appellate court may consider. The Courts of Appeals for the Second Circuit, the Fifth Circuit and the District of Columbia Circuit hold that they may review *all* the evidence before the trial court and may overturn the jury verdict on the basis of any contradictory testimony. In the instant case, the Court of Appeals for the Second Circuit ("Second Circuit") reversed a jury finding that the defendants had conspired. The Courts of Appeals for the First and Third Circuits follow a more restrictive standard, limiting their review to the verdict winner's evidence and the uncontradicted and unimpeached evidence of the party seeking to overturn it.

This Court recently defined the limits on appellate review of judgments in bench trials.[1] In order to promote the consistent administration of justice, it should review the standard applied to appeals involving jury verdicts.

---

[1] *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, ___ U.S. ___, 72 L. Ed.2d 606 (1982); *Pullman-Standard, Division of Pullman, Inc. v. Swint*, ___ U.S. ___, 72 L. Ed.2d 66 (1982).

A. *Proof at Trial*

Petitioner, Venture Technology, Inc. ("Venture"), brought this action alleging, *inter alia*, that the defendants had conspired, in violation of §1 of the Sherman Act, to prevent it from entering the market for the production of natural gas in western New York, particularly Chautauqua County. As the public gas utility in western New York and parts of Pennsylvania and Ohio, defendant National Fuel Gas Distribution Corporation ("Distribution") was the market for that gas. Defendant Flint Oil & Gas Company, Inc. ("Flint") was one of the two largest local gas producers, having drilled 100 to 200 wells by 1975. The concerted action of Distribution and Flint was evidenced in part by the long-standing relationship between Flint and Distribution's Assistant Secretary and Director of Gas Purchases, John Fox ("Fox").

Designated by Distribution as the "enticer", Fox was charged with attracting gas producers to western New York (1108-10).[2] Distribution's vice president instructed him to "render Flint every possible assistance" in its effort to "get off the ground" (1167-68). From Flint's beginnings, Fox had substantial contact with its principals, particularly its president, Salvatore Giallombardo ("Giallombardo"). For substantial fees, Fox of Distribution helped Flint accumulate drilling acreage (855-58). He also attended meetings of its investors, although there was no evidence that he ever did so for other producers (869-70; App. A-6). He met frequently and privately with Flint's officers to provide "advice and counsel" (872-73, 1412-13, 2150).

Fox also dealt with Flint through Priority Acquisitions ("Priority"), a real estate firm which he owned and operated with his wife. Indeed, Flint was Priority's *only* client (860-61). Fox obtained numerous leases for Flint, receiving commissions for each from Flint (855-58).

---

[2]References in parentheses are to the Joint Appendix filed in the court below, unless preceded by "App.", in which case the reference is to the Appendices annexed to this petition.

Fox negotiated Flint's purchase of a 167-acre parcel in Alden, New York, the only land which Flint purchased rather than leased (2164). Flint paid $100,460 in 1973 and sold it in January 1980, during the course of the trial, for $102,000. One of Flint's principals characterized the $17,000 commission paid Fox as a "token of appreciation" for the "considerable favors" Fox had done for Flint (113-18, 2155-58).

Distribution's management was aware of Fox's relationship with Flint and condoned it. Indeed, Distribution's vice president, when informed of these dealings, stated "by all means do it" (1116). One of Distribution's chief geologists testified, however, that Distribution admonished him against independent business dealings with any producer to avoid potential conflicts of interest (1228-29).

In 1975, Venture entered the stage already occupied by Distribution and Flint. Distribution was experiencing a severe gas shortage, and William Waytena ("Waytena"), Venture's President, had become disgruntled with his investment in Flint. Together with two others, he formed Venture. By November, Venture was prepared to drill on three properties, designated at trial as the Boyd, Grant, and Frey parcels.

Its representatives met with Distribution on November 19, 1975, receiving assurances that Distribution would issue commitment letters to purchase the gas from the Boyd and Grant wells, although it would not enter into a purchase contract until the New York State Public Service Commission ("PSC") had acted on its application for approval of a price escalator clause in its contracts. Distribution also indicated that it was preparing a well-spacing policy, which would relate to the size of parcels and the distance between wells, but assured Venture that the policy was not final and would not apply to the Boyd and Grant wells (413). Although a draft was available, Distribution withheld its terms from Venture (1260).

Venture also learned then that Fox was directly overseeing its operations, a curious practice in view of his transfer to Houston. Furthermore, by October 1975 Distribution used a committee to oversee local gas production. Fox's role was limited to problem applications (740). Venture was the only "problem" identified at trial.

His departure from Buffalo did not end Fox's contact with Flint. He spoke frequently with Giallombardo by telephone and visited Flint's offices during each of his semi-monthly visits to Buffalo. Fox testified that during one conversation Giallombardo "expressed grave concern" and began to "rant and rave" about Venture's drilling in an area where Flint also had wells (953-54). A Flint employee testified that at another time Giallombardo was "very upset" about a Venture well located near one of the better Flint wells (1595-96, 1601).

On November 21, 1975, Venture received a copy of the spacing policy, dated November 1, 1975. It provided that Distribution would neither sell nor transport gas produced from parcels of less than 40 acres or from wells within certain minimum distances from lot lines and existing wells. On December 3, 1975, Fox told Venture, for the first time, that Distribution would not purchase gas from the Boyd and Grant wells, stating that they violated the spacing policy, which was applied to Venture retroactively. Although the parcels were less than 40 acres, each well location exceeded the minimum distance from any existing well — the only meaningful condition necessary to prevent intercommunication between wells, the avowed purpose of the policy (1202-03, 1227-28).

The circumstances of the policy's promulgation were in dispute. Fox drafted it hastily, coincident with his many communications with Giallombardo (679, 1079). Fox indicated there was no need for the policy prior to the fall of 1975, because "the problem had not existed except for a short

time prior to this" (974). Another Distribution officer testified that the policy was conceived in "rump sessions" over coffee as a solution to the "little problem" and "presto that was settled on" (1253-58). It was finalized without consultation with Distribution's Senior District Geologist (1195).

Distribution also refused to issue a commitment to purchase the gas from Venture's Frey well. Before Venture could drill, Fox indicated that its well was too close to a proposed Flint well, although Venture's well complied in all respects with the spacing policy, a fact admitted by Distribution's Director of Local Gas Purchases (744-45, 754, 2345). On December 23 1975, Frey's attorney declared the lease null and void because drilling had not commenced within the time provided. On the very next day, Frey leased to Flint. Flint's well, in which each of its principals invested, clearly violated the spacing policy. (746-49, 1082-84, 1438-42, 2351-57, 2386).

Giallombardo previously told Frey that Venture would be unable to sell the gas (167). In December, he assured Frey's attorney that "there would be no problem in selling gas" if Flint drilled (544-45). After Frey had terminated the Venture lease, Fox recommended that he contact Flint, among other producers (979).

Distribution and Flint attempted to explain these curious circumstances by claiming that Flint attempted to "accommodate" Venture. Distribution's officers testified that they urged Flint to defer drilling its other well in order to provide time to reach a solution. That request came on December 17, 1975, well after the original 30-day period of the Venture lease, and close to year's end, the deadline set by Frey for his tax purposes.

In addition to the spacing policy, Distribution claimed that its pending PSC application precluded a commitment to purchase Venture's gas (169-70, 414-15). Distribution sought PSC approval to pass on to consumers the costs of the

proposed price escalator clause.[3] It enlisted the aid of Flint, which considered the price escalator "very important" and provided material to the PSC (1446-47).

Distribution offered producers other than Venture "interim agreements" which they could ratify or reject after the PSC acted (703-04). Venture was willing to sell its gas at the current, rather than escalated price. At a December 4, 1975 PSC meeting, curiously chaired by Distribution's Vice President, Bernard Kennedy ("Kennedy"), Giallombardo shouted down Venture's attorney when he attempted to explain its position (424). Kennedy thereupon ruled Venture's attorney out of order. In a post-meeting conversation, Kennedy told him that a purchase contract without the escalator was "not in the interest of some drillers . . . particularly Flint . . . ." (614).

By the spring of 1976, it was apparent that Distribution would not purchase Venture's gas. Venture disposed of its remaining leases, transferring some to another Waytena company, and commenced this action, alleging, *inter alia*, that Distribution and Flint had violated §1 of the Sherman Act, 15 U.S.C. §1. Jurisdiction of the District Court was based upon 15 U.S.C. §15 and 28 U.S.C. §§1331 and 1337.

B. *The Jury Verdict*

The jury deliberated for a full week following the eight-week trial, found that the defendants had violated §1 of the Sherman Act and the Donnelly Act,[4] and awarded Venture $500,000 in damages, before trebling.

---

[3]The escalator clause would have tied local gas prices to interstate pipeline prices.

[4]N.Y. Gen. Bus. Law §340 (McKinney 1968).

C. *The District Court Decision*

Distribution and Flint moved for judgment n.o.v., or, in the alternative, for a new trial. The District Court wrote a 74-page opinion denying those motions and "squarely reject[ing]" the defendants' argument that the jury could not have found a conspiracy (App. A-10). Judge John T. Elfvin found that the jury was not required to accept the defendants' interest-motivated explanation of the contacts between Flint and Distribution (App. A-12).

The defendants' conduct was "consistent with the concerted action charged and . . . at the least very curious in the absence of such concert" (App. A-14). Such evidence, found the District Judge, demonstrated far more than mere contacts between the defendants. In sum, "[t]he record [was] such that the jury could have inferred the existence of a well-executed scheme to keep moving the pea one step ahead of Venture until the latter concluded that it would never win the game" (App. A-18).

The District Judge examined the reasons offered in justification of Distribution's refusal to purchase Venture's gas, and concluded that "there is substantial evidence for the jury to have rejected any or all of them as mere pretexts" (App. A-16). Having heard all the evidence, he observed that "[t]he action resolved itself into questions of credibility, the determination of which is perhaps a jury's greatest ability. Because of the importance herein of issues of credibility, I am extremely reluctant to upset the jury's decision. On the evidence presented I would not be justified in so doing" (App. A-22).

D. *The Decision of the Second Circuit*

The Second Circuit reversed and remanded for entry of judgment in favor of Distribution and Flint. It selected for discussion some, but not all, of the evidence and concluded that

it was insufficient to support the inference of concerted activity.

It inferred that "the entire Venture matter was not of great moment [to Distribution]," (App. B-11) despite the evidence that Fox handled Venture's application personally in a departure from established company practice. It discredited the evidence of Flint's payments to Fox and his uniquely close connections with Flint. It wrote Distribution's spacing policy, and particularly its application to Venture, out of the case simply because Flint did not participate in the formulation of the policy and objected to its implementation. The inference that resort to that policy was an act by Distribution in furtherance of the existing conspiracy received no mention.

The Second Circuit accepted the defendants' explanation of the Frey transactions. Likewise, it accepted Distribution's reliance on its PSC application as a justification for its refusal to commit to purchase Venture's gas, with no mention of the "interim agreements" offered to other producers. The pretextual nature of the defendants' explanations of their conduct was, in the eyes of the court, insufficient alone to support the inference of concerted activity, but the court failed to consider that evidence in light of the other evidence.

The Second Circuit began its analysis by noting that it could reverse only if there was " 'but one reasonable conclusion as to the proper judgment' . . . (Citing *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), petition for *cert. filed*, ____ U.S. ____, 50 U.S.L.W. 3984 (May 28, 1982) (No. 81-2215)" (App. B-8). After reviewing the evidence, it concluded that "taken as a whole, the evidence points with at least as much force toward unilateral actions by Distribution as toward conspiracy . . . ." (App. B-15). Nevertheless, the court reversed.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I

Certiorari should be granted to review the standard imposed by the Second Circuit in a recent line of cases, in conflict with the First and Third Circuits, which permits the Appellate Court to make a *de novo* determination of factual issues.

Venture respectfully urges this Court to review the decision of the Second Circuit, not only to ensure that that court applies the proper standard of review in appeals involving jury verdicts, but also to resolve the conflict among the circuits as to the scope of evidence subject to appellate review. In such appeals, the Second Circuit reviews *all* the evidence to determine whether there is substantial evidence to support the jury's findings, a practice that "comes dangerously close to weighing the evidence." 9 C. Wright and A. Miller *Federal Practice and Procedure* §2529 at 571 (West 1971). In effect, that standard permits the court to draw inferences which it deems proper, substituting its judgment for that of the jury.

The Second Circuit has accepted the testimony of interested witnesses on behalf of the parties seeking to overturn the verdict. It has drawn inferences based on such interested testimony, despite the fact that, unlike the jury or the District Judge who reviewed that verdict in the first instance, it could not observe the demeanor or assess the credibility of the witnesses.

This Court should review that practice for three reasons. First, the standard applied by the Second Circuit is a radical departure from established appellate practice, and ignores the directions of this Court concerning the deference due to determinations by triers of fact. Second, the Second Circuit's standard conflicts with the more limited review of the facts

undertaken by the First and Third Circuits. Third, that court's practice essentially denies the parties the right to trial by jury.

Each of these considerations goes to the core of the fact-finding function of the federal judicial system and affects all litigants. Review is warranted because the Second Circuit has departed from the accepted and usual practice in judicial proceedings, and its course will be righted only by the exercise of this Court's supervisory powers. In order to ensure compliance with the Seventh Amendment and that justice is administered fairly and consistently, this Court should review the decision below.

The facile reversal of the jury verdict following the lengthy trial in this case does not stand alone in the Second Circuit.[5] Citing *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980) *cert. denied*, 102 S.Ct. 639 (1981), *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), petition for *cert. filed*, 50 U.S.L.W. 3984 (U.S. May 28, 1982) (No. 81-2215), and *Schwimmer v. Sony Corp. of America*, 677 F.2d 946 (2d Cir. 1982), petition for *cert. filed*, 51 U.S.L.W. ____ (U.S. August 16, 1982) (No. 82-277), it determined that the jury and District Judge Elfvin had erred in concluding that Distribution and Flint had conspired. The court summarized the evidence from this eight-week trial in five pages. Its brief decision contrasts sharply with the District Judge's 74-page

---

[5] *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036 (2d Cir. 1976) (The court reversed a jury verdict in the plaintiff's favor, following a four-week trial of the antitrust action, on the ground that there was insufficient evidence of concerted action); *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir. 1978), *cert. denied* 439 U.S. 946 (1978) (The majority of the court sitting *en banc* credited the testimony of the defendant's officers in holding that the plaintiff's termination did not result from an unlawful conspiracy. The court affirmed a directed verdict for the defendant after retrial on the ground that the plaintiff had failed to prove a conspiracy. *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980), *cert. denied*, 102 S.Ct. 639 (1981)); *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), petition for *cert. filed*, ____ U.S. ____, 50 U.S.L.W. 3984 (U.S. May 28, 1982) (No. 81-2215) ("*Moore*") (The court, relying in part upon disputed and inconsistent testimony of the defendant's witnesses, reversed the denial of the defendant's motion for

Footnote continued on next page—

analysis of the evidence following his first-hand observation of the testimony and demeanor of the witnesses.

The Second Circuit simply accepted much of the defendants' testimony. It concluded that the relationship between Fox and Flint could not support an inference of conspiracy. It found those contacts "unremarkable", ignoring the fact that Fox's consistent and frequent contacts with Flint continued well after his move to Houston, as did Flint's payments to him. District Judge Elfvin, on the other hand, held that the jury could reasonably have inferred that Distribution and Flint acted in concert. The evidence supplied a motive for each to do so, demonstrating "far more than mere contacts . . ." (App. A-14). The defendants' actions not only were "consistent with the concerted action charged," but also "at the very least curious in the absence of such concert" (App. A-14).

The Second Circuit blandly recounted the monetary benefits earned by Fox from his dealings with Flint. It did not explain why the jury could draw no inference from the fact that Priority had but one client — Flint. The $17,000 "token of appreciation" appeared in its decision as a mere brokerage commission, with no mention of the damning admission of Flint's principal. The jury and the District Judge recognized the Fox-Priority-Flint relationship for what it was. The defendants dealt at less than arms length, and Fox and Distribution "could be expected to be quite receptive to a cry that Flint was being injured by a competitor" (App. A-6).

—Footnote continued from preceding page

judgment n.o.v.); *Schwimmer v. Sony Corp. of America*, 677 F.2d 946, (2d Cir. 1982), petition for *cert. filed*, ___ U.S. ___, 51 U.S.L.W. ___ (U.S. August 1982) (No. 82-277) ("*Schwimmer*") (The court again reviewed all the evidence and accepted the defendant's explanation of the plaintiff's termination in holding the proof of conspiracy was insufficient. It even determined an issue of credibility, refusing to credit the testimony, favorable to plaintiff's position, of one of the defendant's executives, because it was not corroborated by other defense witnesses.); *Unijax, Inc. v. Champion International, Inc.*, ___ F.2d ___, 1982-2 Trade Cases ¶64,814 (2d Cir. 1982) (The court, in affirming judgment for the defendant n.o.v., reviewed the evidence which it deemed relevant, and concluded that the plaintiff had failed to prove a tying arrangement in violation of §1 of the Sherman Act.).

The petitions filed in *Moore* and *Schwimmer* raise many of the same issues presented here.

The Second Circuit accepted Fox's and Giallombardo's explanation of their conversations concerning Venture — that they were limited to Distribution's existing obligation to purchase Flint's gas and the closeness of Venture's well. The District Judge did not require the jury "to accept [the defendants'] interest-motivated testimony as to the limits of their conversation." (App. A-12).

The defendants' explanation of Distribution's spacing policy as a purported justification for the refusal to buy Venture's gas found a receptive ear in the Second Circuit. The court ignored the inconsistent testimony of Distribution's officers concerning its formulation and the evidence that on November 19, 1975 Distribution assured Venture that the policy would not apply to the Boyd and Grant wells. The District Judge recognized "[t]he spacing policy was rushed into place, and on a retroactive basis, within three days of Giallombardo's complaint and little more than a week after Distribution's assurance to [Venture] that it was weeks away from implementation" (App. A-14).

The circumstances of the Frey lease are dismissed by the Second Circuit's acceptance of the defendants' testimony of their purported efforts to reach an "accommodation." The District Judge found that the jury "could easily . . . construe [that explanation] as a mere sham" (App. A-16).

The conflicting results reached by the Second Circuit and the District Judge result from the different standards applied by each in reviewing the verdict. The Second Circuit reviewed all the evidence, and, inevitably, drew its own inferences, which carried the day. The District Judge was more circumspect, guided by the principle that "the non-moving party must be given the benefit of all reasonable inferences from the evidence, and evidence unfavorable to it may be considered only if that evidence stands uncontradicted and unimpeached. (*See e.g.*,

Bigelow v. Agway, Inc., 506 F.2d 551, 554 (2d Cir. 1974)"[6] (App. A-3). His decision recognizes the deference to be given the trier of fact. The Second Circuit's standard, in effect, makes it the fact finder. That standard should be reviewed.

A. *The Second Circuit's Review Of Jury Verdicts Conflicts With The Principles Established By This Court Affirming The Role Of Juries And District Courts In Determining Questions Of Fact.*

In the past year, this Court has reaffirmed the deference due factual findings by the District Court in bench trials. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, ____ U.S. ____, 72 L. Ed.2d 606 (1982) (*"Inwood"*) and *Pullman-Standard, a Division of Pullman, Inc. v. Swint*, ____ U.S. ____, 72 L. Ed.2d 66 (1982) (*"Pullman"*), enunciate the principle that those issues are best resolved at the trial level and such determinations should not be overturned lightly on appeal. In *Inwood*, this Court noted "the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence. (Citation omitted)." *Id.* at , 72 L. Ed.2d at 616.

This Court criticized the Second Circuit's reversal:

> By rejecting the District Court's finding simply because it would have given more weight to the evidence of mislabelling than did the trial court, the Court of Appeals clearly erred. Determining the weight and credibility of the evidence is a special province of the trier of fact.

---

[6] As will be discussed below, the same conflict over the applicable scope of review exists among the circuits. Interestingly, Judge Elfvin derived his standard from the Second Circuit's own decision in *Bigelow v. Agway, Inc.*, *supra*, a decision apparently abandoned by that court.

Id. at , 72 L. Ed.2d at 616-17,[7] and elaborated on that court's error.

> An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent." *United States v. Real Estate Boards*, 399 U.S. 485, 495 (1950).

Id. at , 72 L. Ed.2d at 618. The inferences drawn by the District Court were not unreasonable, and the Second Circuit cited no evidence to support its conclusion that they were. *Id.* at , n. 16, 17, 72 L. Ed.2d at 616-17, n. 16, 17.

Pullman reversed the Fifth Circuit's conclusion which "strongly suggest[ed] that the outcome was a product of the court's independent consideration of the totality of the circumstances it found in the record." *Id.* , 72 L. Ed.2d at 81. This Court rejected such a *de novo* review of the evidence.

Just as the Second Circuit substituted its judgment for that of the trial court in *Inwood*, so it substituted its judgment for that of the jury *and* the District Judge in the present case. If a trial judge sitting alone is entitled to deference, *a fortiori* the decision of a district judge denying a motion for judgment n.o.v., as well as the related verdict, are entitled to the same deference. Both the trial judge and the jury have the advantage of hearing all the evidence and observing the character and demeanor of the witnesses. They are in a far better position to determine the weight to be given to the evidence than is an appellate court, reviewing a lifeless printed record.

---

[7]The District Judge in the instant case was appropriately persuaded that juries are best qualified to determine issues of credibility. *See supra* at 8. This comports with the principle later enunciated in *Inwood* and *Pullman*, but rejected by the Second Circuit.

Deference to triers of fact is not limited to bench trials. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) (*"Continental"*), this Court considered the standard to resolve conflicting inferences from the evidence before the jury:

> Undoubtedly, all of the evidence . . . does not point in one direction and different inferences might reasonably be drawn from it. There was, however, sufficient evidence to go to the jury and it is the jury which "weighs the contradictory evidence and inferences" and draws "the ultimate conclusion as to the facts." *Tennant v. Peoria & P.U.R. Co.*, 321 U.S. 29, 35.

Id. at 700-701. It rejected the appellate court's substitution of its own judgment:

> The evidence relied upon by the court can just as reasonably be read in a manner favorable to Continental and it appears that the court may have misapprehended significant parts of the record. In any event, the interpretation and significance of this evidence were for the jury.

Id. at 701. Likewise, the evidence in the present case just as reasonably supports inferences in Venture's favor, and the Second Circuit misapprehended significant parts of the record.[8]

---

[8]For example, the Second Circuit relied on Flint's purported opposition to Distribution's spacing policy to support its conclusion that there was no conspiracy. Venture claimed, however, that Distribution's implementation of the policy was an act in furtherance of the conspiracy, not requiring the participation or sanction of Flint. *See Beltz Travel Service, Inc. v. International Air Transport Association*, 620 F.2d 1360 (9th Cir. 1980). Also, the Second Circuit concluded that the $17,000 "token of appreciation" paid to Fox by Flint could not support an inference of conspiracy because it predated Venture's formation. That conclusion misapprehends Venture's claim that Distribution and Flint conspired to keep aggressive competitors in general out of the market, and merely directed their efforts at Venture as one object of the conspiracy.

The Second Circuit's decision is squarely at odds with the teachings of *Continental Ore, Inwood* and *Pullman*. That conflict is made manifest by its reversal, despite the conclusion that "taken as a whole, the evidence points with at least as much force toward unilateral actions by Distribution as toward conspiracy . . . ." (App. B-15). The directions from this Court dictate but one result from that conclusion — an affirmance of the District Court judgment. This Court exercised its supervisory powers to correct the erroneous standard applied by the Second Circuit in *Inwood*. It should do no less here.

B. *The Second Circuit's Review Of* All *Evidence To Determine Whether Substantial Evidence Supports A Jury Verdict Conflicts With Decisions Of The First and Third Circuits.*

The Courts of Appeals, guided by the precedents of this Court,[9] are in general agreement that they may reverse a jury verdict, or a denial of a motion for judgment n.o.v., only if fair-minded men could reach but one conclusion from the evidence. A conflict exists, however, as to the evidence an appellate court may review in applying that broad standard.

The First Circuit has held that, in reviewing a directed verdict for the defendant at the close of the evidence,[10] it should consider only the non-movant's evidence and uncontradicted and unimpeached evidence introduced by the movant. *Dehydrating Process Co. v. A.O. Smith Corp.*, 292 F.2d 653 (1st Cir. 1961). That court has expanded its "field of vision" to include documentary evidence, the existence of which is undisputed. *Layne v. Vinzant*, 657 F.2d 468 (1st Cir. 1981). The Court of Appeals for the Third Circuit has adopted the same standard. *Inventive Music Ltd. v. Cohen*, 617 F.2d 29, 33, (3d Cir. 1980); *Fireman's Fund Insurance Co. v. Videfreeze Corp.*,

---

[9] *Lavender v. Kurn*, 327 U.S. 645 (1946); *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29 (1944); *Brady v. Southern Railway Co.*, 320 U.S. 476 (1943); and *Gunning v. Cooley*, 281 U.S. 90 (1930).

[10] The same standard of review applies to directed verdicts and motions for judgment n.o.v. *Yezzie v. Sullivent*, 561 F.2d 183, 188 (10th Cir. 1977).

540 F.2d 1171, 1178 (3d Cir. 1976) (holding that inferences from contradicted testimony must be left to the jury).

The Fifth Circuit has broadened its review to consider *all* the evidence, not merely that supporting the non-movant. *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969). The Court of Appeals for the District of Columbia applies the same doctrine. *Boutros v. Riggs National Bank, D.C.*, 655 F.2d 1257 (D.C. Cir. 1981). *See also Panter v. Marshall Field & Co.*, 646 F.2d 271 (7th Cir. 1981).

The conflict is real, not a question of semantics. 9 C. Wright & A. Miller, *Federal Practice and Procedure* §2529 (1971). That commentator argues that a rule permitting consideration of all the evidence is too broad, urging instead that only the movant's uncontradicted evidence be included with the non-movant's evidence in the appellate court review. *Id.*[11]

The Second Circuit has now joined those circuits permitting review of all the evidence, although that was not always the case. In *Bigelow v. Agway Inc.*, 506 F.2d 551 (2d Cir. 1974), the court reviewed only the non-movant's evidence and the movant's uncontradicted and unimpeached evidence in reversing a directed verdict for the defendants. In *County Asphalt, Inc. v. Lewis Welding & Engineering Corp.*, 444 F.2d 372 (2d Cir. 1971), the court held that the jury need not accept testimony merely because it was uncontradicted and unimpeached. The jury was to determine credibility, and was not bound to accept the testimony of the plaintiff's damages expert. "[W]hen it comes to finding facts from the evidence, juries enjoy a near-total independence." *Id.* at 378.[12]

---

[11] Other commentators have also criticized the broader view. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 Minn. L. Rev. 903, 948-53 (1971); Bagalay, *Directed Verdicts and the Right to Trial by Jury in Federal Courts*, 42 Tex. L. Rev. 1053, 1062-63 (1964); James, *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 Va. L. Rev. 218, 226 (1961).

[12] *See also dicta* in *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970).

Apparently, that is no longer true. In *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737 (2d Cir. 1975), the court examined the entire record, rejected certain evidence favoring the plaintiff, and concluded that there was insufficient evidence to support the jury verdict. This practice has now become the rule in the Second Circuit, and the court substitutes its judgment for that of the trier of fact.

Definition of the proper role of the fact finder is crucial. The deference which this Court shows to the trier of fact is clear. The conflict concerning the appropriate scope of review of verdicts threatens the traditional respect for those factual determinations. Certiorari is required to resolve the conflict and define the scope of appellate review, consistent with the Seventh Amendment.[13]

---

[13]The Seventh Amendment to the United States Constitution prohibits the Courts of Appeals and this Court from redetermining facts found by the jury. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 359 (1962). In the past, the Second Circuit at least has paid lipservice to the strictures thereby imposed on it. *See Michelman v. Clark-Schweble Fiber Glass Corp.*, 534 F.2d 1036 (2d Cir. 1976). The issue of conspiracy in this case is a factual one. The District Judge's conclusion in this regard bears reiteration. "The action resolved itself into questions of credibility, the determination of which is perhaps a jury's greatest ability" (App. A-22).

Venture presented its evidence and arguments to the jury. The jury heard the testimony and observed the demeanor of all the witnesses. It deliberated for a full week. The District Judge recognized this in his opinion. Nevertheless, the Second Circuit conducted its own review of the evidence inferring that there was no conspiracy. In so doing, it effectively denied Venture its right to trial by jury. Its conclusion that "taken as a whole the evidence pointed with at least as much force toward unilateral actions by Distribution as toward conspiracy . . ." (App. B-15) demonstrates the harsh result of that denial.

II

This Court should review the standard imposed by the Second Circuit which limits the nature of the evidence deemed sufficient to demonstrate concerted action under Section 1 of the Sherman Act.

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, (1962) held that in cases involving alleged concerted action in violation of §1 of the Sherman Act:

> Plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each ". . . The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *United States v. Patten*, 226 U.S. 525, 544 . . . ; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it." *American Tobacco Co. v. United States*, 147 F.2d 93, 106 (C.A. 6th Cir.).

The Second Circuit ignored this standard, separately reviewing selected elements of the evidence. In each instance, the court found the evidence standing alone insufficient to support the inference of concerted action. Despite its conclusion that the evidence taken as a whole supported conflicting inferences, it viewed the parts rather than the whole in concluding that the jury had erred.

The court below has formulated a new doctrine. Although recognizing that conspiracies by their nature must be proved inferentially and largely from circumstantial evidence, the court in *Michelman v. Clark-Schwebel Fiber Glass Corp.*, *supra*, perceived a lack of evidence of the defendants' overt commitment to a common goal, and rejected a jury finding of conspiracy. *See also Fuchs Sugar & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025 (2d Cir. 1979), *cert denied*, 444 U.S. 917

(1979). In more recent decisions, the court appears to require that the plaintiff present direct evidence of a contract or agreement. In *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980) *cert. denied*, 102 S.Ct. 639 (1981), the court held that, in the absence of direct testimony of agreement, the circumstantial evidence showed only "close relations" between the defendants, which it deemed insufficient to support the inference of conspiracy. In *Schwimmer v. Sony Corp. of America*, 677 F.2d 946 (2d Cir. 1982) petition for *cert. filed*, ___ U.S. ___, 51 U.S.L.W. (U.S. August 16, 1982) (No. 82-277), it found that ample proof of dealer complaints and contacts among defendants in which the plaintiff's competitive practices were discussed, together with responsive action by the manufacturers, insufficient to support the inference of conspiracy. Likewise, similar evidence in *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981) petition for *cert. filed*, ___ U.S. ___, 50 U.S.L.W. 3984 (May 28, 1982) (No. 81-2215), was found insufficient.

In the instant case, the court determined that, as a matter of law, there was no evidence of concerted activity. This despite a record replete with evidence of the relations between Distribution and Flint, favored treatment of Flint, payments from Flint to one of Distribution's officers, complaints from Flint about Venture, the curious circumstances of the Frey transactions, a selectively and retroactively imposed spacing policy, and *post hoc* rationalizations of otherwise commercially irrational business conduct. Not surprisingly, there was no testimony from the defendants that they had agreed to keep Venture out of the market. Absent such evidence, the Second Circuit cannot bring itself to find a conspiracy or permit a jury to do so.

The holdings of the Second Circuit conflict with recent decisions in the Seventh and Eighth Circuits. In *Spray-Rite Service Corp. v. Monsanto Co.*, ___ F.2d ___, 1982-2 Trade Cases ¶64,808 (7th Cir. 1982), the court held that evidence of dealer complaints followed by responsive action by a manufacturer was sufficient to support an inference of con-

spiracy. The Eighth Circuit applied the same standard in *Battle v. Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982).

Competitors are unlikely to enter into explicit agreements to suppress competition. More likely, they will act covertly and the conspiracy can be deciphered only through an analysis of the totality of their actions, including their effect. If the standard applied by the Second Circuit is permitted to remain, it is unlikely that any plaintiff will be able to demonstrate concerted activity. Section 1 of the Sherman Act will be effectively emasculated. Certiorari is required to enable review by this Court of this apparent departure from the traditional standard of proof required to establish concerted action within the meaning of §1 of the Sherman Act.

CONCLUSION

Based upon the foregoing, it is respectfully requested that this petition for a writ of certiorari be granted to review the judgment and opinion of the Second Circuit because that decision is in conflict with the decisions of this Court and Courts of Appeals in other circuits and raises significant and recurring questions of federal law.

Dated: Rochester, New York
August 30, 1982

Respectfully submitted,

JAMES MATTHEW HARTMAN, ESQ.
Counsel of Record for Petitioner
Two State Street
Rochester, New York 14614
Telephone: (716) 232-4440

Of Counsel:
Richard L. Smith
Harris, Beach, Wilcox
Rubin and Levey